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In the Supreme Court of the United States

OCTOBER TERM, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTES OF HEALTH IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the plaintiff in an action removed under 28 U.S.C. 1442(a)(1) must have Article III standing.

2. Whether respondent Administrators of the Tulane Educational Fund (Tulane) was entitled to remove this action to federal court as a "person acting under" a federal officer within the meaning of 28 U.S.C. 1442(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 22 F.3d 1094 (Table). The opinion of the district court (Pet. App. A5-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1994. A petition for rehearing was denied on June 9, 1994. Pet. App. A13-A14. The petition for a writ of

certiorari was filed on August 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is described in the prior opinions of this Court, *International Primate Protection League (IPPL)* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991), and the Fifth Circuit, *In re Administrators of the Tulane Educ. Fund*, 954 F.2d 266 (1992); *IPPL* v. *Administrators of the Tulane Educ. Fund*, 895 F.2d 1056 (1990). The case concerns the care and custody of macaque monkeys that were the subject of experiments concerning the ability of the monkeys to recover the use of a limb after sensory nerves in the limb had been "deafferented" (severed). The experiments were first conducted in 1981 by a private research facility, respondent Institutes for Behavior Resources (IBR), under a grant from respondent National Institutes of Health (NIH). The present petition seeks review of the Fifth Circuit's holding that the case was properly removed from state court under 28 U.S.C. 1442(a)(1) by respondent Administrators of the Tulane Educational Fund (Tulane), and properly dismissed because petitioners lack Article III standing. Pet. App. A1-A4.

1. In September 1981, the State of Maryland seized 17 monkeys from IBR's laboratory in Silver Spring and initiated criminal proceedings against Dr. Edward Taub based on alleged mistreatment of the monkeys. NIH took temporary custody of the monkeys under an order of a Maryland state court. *IPPL*, 500 U.S. at 75 n.1. After Dr. Taub was cleared of all state criminal charges, the custody order terminated, but NIH kept custody of the monkeys under an agreement with IBR, the owner of the

monkeys. *Ibid.* That agreement remains in effect. See *ibid.*

In December 1981, several petitioners and other plaintiffs sued IBR, NIH, and other defendants in a Maryland state court. The plaintiffs alleged that the defendants had violated state animal welfare laws and the federal Animal Welfare Act, 7 U.S.C. 2131 *et seq.* See *IPPL* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934, 937 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). NIH removed the action to federal court under 28 U.S.C. 1441(b), and then IBR moved to dismiss the action on the ground that the plaintiffs lacked Article III standing. 799 F.2d at 937. The district court dismissed the action for lack of standing, and the Fourth Circuit affirmed. *Ibid.*

2. In 1986, while the Fourth Circuit case was pending, NIH sent several of the monkeys to Tulane University's Delta Primate Research Center in Covington, Louisiana. NIH also entered into a contract with Tulane under which Tulane agreed to assist NIH in its role as custodian of the monkeys. *IPPL*, 500 U.S. at 75.

In 1988, NIH announced plans to "euthanize three of the remaining monkeys and, in the process, to complete some of the medical research by performing surgical procedures." 500 U.S. at 76. Petitioners then filed this action in the Civil District Court for the Parish of Orleans, Louisiana. They alleged that respondents' treatment of the monkeys violated Louisiana law. They also sought preliminary and permanent injunctive relief, including an order giving custody of the monkeys to petitioners or certain members of the United States Congress.

Respondent NIH removed the action to the United States District Court for the Eastern District of

Louisiana under 28 U.S.C. 1442(a)(1).[1] See *IPPL*, 500 U.S. at 75. The district court issued a temporary restraining order barring NIH from performing euthanasia and medical research on the three monkeys. *Id.* at 75-76. After the court extended the order beyond the 20-day limit for temporary restraining orders specified in Fed. R. Civ. P. 65(b), NIH appealed the order as a preliminary injunction under 28 U.S.C. 1292(a)(1). See *IPPL*, 500 U.S. at 76.

The Fifth Circuit vacated the preliminary injunction and dismissed the case. It first held that plaintiffs lack Article III standing. 895 F.2d at 1062. It rejected petitioners' contention that they have standing because of their "personal relationships" with the monkeys, their "long-standing, sincere commitment to preventing inhumane treatment of animals," or their asserted role as "[a]dvocates for * * * the monkeys." *Id.* at 1059-1061. The court further held that NIH was entitled to remove the action under 28 U.S.C. 1442(a)(1), because that provision authorizes removal by federal agencies. 895 F.2d at 1061-1062.

This Court granted certiorari to review the Fifth Circuit's holding on the removal issue, but the Court

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[1] 28 U.S.C. 1442(a)(1) provides:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

declined to grant certiorari to review the Fifth Circuit's holding on the standing issue. 498 U.S. 980 (1990). The Court subsequently reversed the Fifth Circuit's judgment, holding that, while a federal *officer* may remove a case under 28 U.S.C. 1442(a)(1), a federal *agency* may not. 500 U.S. at 88-89. In light of its conclusion that NIH was not entitled to remove the action, the Court ordered the case remanded to state court. *Id.* at 74, 89; see 28 U.S.C. 1447(c).

3. On remand to the state court, Tulane removed the action to district court under Section 1442(a)(1) as a "person acting under" a federal officer: namely the Director of NIH. 954 F.2d at 268.[2] The district court remanded the case to state court, however, holding that Tulane could remove the action under Section 1442(a)(1) only if the state court first determined that NIH was an indispensable party under Louisiana law. 954 F.2d at 268.

Tulane petitioned the Fifth Circuit for a writ of mandamus directing the district court to vacate its remand order. The Fifth Circuit granted the petition, holding that the district court "must decide for itself whether Tulane satisfies the two requirements of § 1442(a)(1), *i.e.*, that Tulane is a 'person acting under' an officer of the United States and that its acts are 'under color of such office.'" 954 F.2d at 270. Thereafter, the district court allowed extensive discovery on whether Tulane met those requirements.

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[2] After removing the case, Tulane moved to have the Director of NIH and the Secretary of the Department of Health and Human Services added as parties, and petitioners moved to dismiss NIH as a defendant and to remand the case to state court. 954 F.2d at 268. The district court found it unnecessary to rule on those motions in light of its holding that Tulane was entitled to remove the case. Pet. App. A11 n.2.

On respondents' motion for summary judgment, the district court held that "removal by Tulane was proper under 28 U.S.C. § 1442(a)(1) and that the [respondents'] motion for summary judgment has merit." Pet. App. A6. With respect to removal, the court determined that "sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of [Section 1442(a)(1)], namely that, at all material times, Tulane was and is a 'person acting under' the Director of the NIH, an officer of the United States, and that its acts are 'under color of such office.'" Pet. App. A7. The district court explained that the "depositions and exhibits amassed since the appellate decisions flesh out the details of this controversy but do not alter the conclusion that these privately owned monkeys have been in federal custody for over ten years and that the NIH and its officers have a continuing custodial, financial and research interest in these monkeys." *Id.* at A10.

With respect to standing, the district court stated that, although "there may no longer be an extant Fifth Circuit decision on standing in this case, the Court cannot ignore the fact that the Fifth Circuit has already decided in this very case that there was a federal interest presented and that these plaintiffs do not meet the constitutional requirements for standing to act as advocates for the monkeys' interest." Pet. App. A10. The district court determined that the facts relevant to standing "have not changed since the Fifth Circuit handed down [*IPPL*, 895 F.2d 1056 (1990)], and this Court has been presented with no reason why the Fifth Circuit would now reach a different conclusion upon those same allegations and those same facts." Pet. App. A10-A11. The district court accordingly granted summary

judgment for respondents and dismissed the case. *Id.* at A11.

4. The Fifth Circuit affirmed. Pet. App. A1-A4. It held, first, that Tulane was entitled to remove the action under Section 1442(a)(1). It determined that Tulane is a "person" for purposes of Section 1442(a)(1), because the term "person," as used in that provision, is not limited to natural persons but also includes corporations and similar legal entities. Pet. App. A2. It further determined that Tulane was "acting under" the Director of NIH, an officer of the United States, in carrying out its contract with NIH to care for the monkeys. *Id.* at A3.

The Fifth Circuit next held that petitioners were required to establish Article III standing but had failed to do so. The court said: "The Supreme Court reversed our judgment on a federal *agency's* right to remove under § 1442(a)(1), but left intact our ruling on standing. We are, therefore, bound by our previous holding under the 'law of the case' doctrine." Pet. App. A4.

5. NIH has informed us of the following: Only two monkeys are now housed at Tulane's Primate Research Center. One is a member of the control group of monkeys and thus has never undergone deafferentation. NIH does not plan to use that monkey in any experiments on neural functions. The other monkey had a forelimb deafferented and later amputated. When euthanasia becomes the humane course for that monkey, NIH plans to conduct the same experimental protocol on it that NIH performed on the other monkeys.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. Further review therefore is not warranted.

1. The court of appeals correctly held that petitioners must have Article III standing to assert their claims in federal court. Pet. App. A4.[3] The Constitution limits the power of the federal courts to deciding "[c]ases" and "[c]ontroversies." U.S. Const. Art. III, § 2. Standing "is an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). Thus, if the party seeking relief from a federal court does not have Article III standing, there is no "case" or "controversy" with respect to which the federal court has power to grant such relief.

Petitioners argue, however, that a plaintiff whose case is removed to federal court under 28 U.S.C. 1442(a)(1) need not have Article III standing to assert state-law claims. This Court in *IPPL* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 n.4 (1991), found it unnecessary to decide that issue. There is likewise no need to decide the issue at this point, because it is not the subject of a conflict among the lower courts.

In any event, there is no merit to petitioners' claim that a federal court, in a case removed under Section 1442(a)(1), may award relief to a plaintiff who lacks

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[3] In this Court, petitioners challenge only the Fifth Circuit's holding that they were required to satisfy Article III standing requirements. They do not seek further review of the Fifth Circuit's holding that they did not satisfy those requirements. Although petitioners object (Pet. 12-15) to the Fifth Circuit's grounding of that holding on the "law of the case" doctrine, they correctly concede (Pet. 15) that the Fifth Circuit's application of that doctrine does not warrant further review. In any event, the Fifth Circuit correctly held in its prior decision that petitioners lack Article III standing, 895 F.2d at 1059-1061, and this Court declined to review that holding, 500 U.S. at 78 n.4. There is no reason for a different course here.

Article III standing. Section 1442(a)(1) does not dispense with the requirement that a plaintiff have Article III standing to obtain relief in a federal court. Indeed, Congress cannot, by any statute, expand the Article III jurisdiction of the federal courts. See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982). Furthermore, the fact that state law gives a plaintiff standing in state court does not permit a *federal* court to award relief if the plaintiff lacks Article III standing. See *Waller* v. *Georgia*, 467 U.S. 39, 44 n.3 (1984); see also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is * * * a federal question which does not depend on the party's prior standing in state court.").

Petitioners point out (Pet. 8) that, to remove an action under Section 1442(a)(1), the defendant must assert a colorable federal defense so that the case "arises under" federal law, as required by Article III. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989); *Tennessee* v. *Davis*, 100 U.S. 257, 264 (1880). Petitioners reason that, because "this was already an Article III case by virtue of the federal defense, dispensing with Article III's standing requirement would have no jurisdictional consequence." Pet. 8.

Petitioners erroneously confuse the "arising under" requirement of Article III with the "case or controversy" requirement of Article III. Article III's standing requirement is an element of its "case or controversy" requirement. *Lujan*, 112 S. Ct. at 2136. Thus, although the assertion of a colorable federal defense satisfies the "arising under" requirement of Article III, it does not satisfy the standing requirement. That is why, even if an action "arises under" federal law, and is therefore within a federal court's federal question jurisdiction (28 U.S.C. 1331), the action is not one that

federal courts have power to entertain if the plaintiff lacks Article III standing. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2135-2136 (1992) (applying Article III standing in federal question case); *M.A.I.N.* v. *Commissioner, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1052-1053 (1st Cir. 1989) (applying Article III standing in case removed under 28 U.S.C. 1441). Consequently, respondents' assertion of a colorable federal defense does not obviate the need for petitioners to establish Article III standing to seek relief in federal court.

Petitioners also argue, relying upon *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 618 (1989), that they need not meet Article III standing requirements because they were not "the party attempting to invoke the federal judicial power." Pet. 9. Petitioners' reliance upon *ASARCO* is misplaced.

In *ASARCO*, the State's highest court issued a judgment in favor of plaintiffs who lacked Article III standing, and the defendant sought review in this Court. This Court held that review was appropriate, because the adverse state judgment gave the defendant/petitioner sufficient injury-in-fact to provide Article III standing. *ASARCO*, 490 U.S. at 618. The fact that the plaintiffs did not have standing did not prevent review because "they [we]re not the party attempting to invoke the federal judicial power." *Ibid.*; see also *Northeastern Florida Chapter of Associated Gen. Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297, 2303 n.4 (1993).

ASARCO is inapposite here. In *ASARCO*, the Court was not called upon to award affirmative relief to a party who lacked Article III standing. Rather, the Court's review was limited to the issue upon which the petitioner/defendant had standing—whether the adverse state court decision should be reversed. In a case

removed under Section 1442, by contrast, the federal courts are called upon to award affirmative relief to the plaintiff. Even though the plaintiff did not bring the case in federal court initially, the fact remains that, if the plaintiff lacks Article III standing, there is no federal "case" or "controversy" with respect to the plaintiff's request for affirmative relief.[4]

Indeed, petitioners' argument that Article III standing is not required unless the plaintiff "invokes" the federal judicial power would apply to *every* type of removal—including federal question removal under 28 U.S.C. 1441[5]—because the defendant in a removed case will always be the party who first invokes the federal judicial power. Yet courts routinely, and properly, require that the plaintiff in a federal question removal case have Article III standing. See, *e.g.*, *M.A.I.N.*, 876 F.2d at 1052-1053.

The application of Article III standing requirements to plaintiffs in removed cases will not send state law "into oblivion," as petitioners assert (Pet. 10). A plaintiff remains free to bring state-law claims in state court

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[4] In *IPPL*, this Court held that petitioners had standing to seek review in this Court of the Fifth Circuit's holding that NIH was entitled to remove the case, without regard to whether petitioners had standing to pursue their underlying state-law claims for affirmative relief. 500 U.S. at 78 n.4. Accordingly, we do not challenge petitioners' standing to seek review of the Fifth Circuit's decision below holding that Tulane was entitled to remove the case. Our submission, instead, is that petitioners were required to have Article III standing to obtain relief on their underlying state-law claims.

[5] 28 U.S.C. 1441 authorizes the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C. 1441(a), including civil actions "founded on a claim or right arising under the Constitution, treaties or laws of the United States," 28 U.S.C. 1441(b).

against private parties who are not acting under a federal officer, and to take advantage of any less stringent standing requirements applicable in the state court. When a plaintiff sues a federal officer or person acting under a federal officer, however, the defendant has a right to remove the case if the defendant asserts a colorable federal defense. *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Once the defendant exercises that right, the federal court has the power to adjudicate the case only within the constraints of Article III.[6]

Arizona v. *Manypenny*, *supra*, does not support a contrary conclusion, as petitioners assert (Pet. 10-11). The Court there held that "in a criminal proceeding removed to federal court, a State may appeal under [28 U.S.C.] § 1291 from an adverse judgment if statutory authority to seek such review is conferred by state law." *Manypenny*, 451 U.S. at 250. The Court emphasized that the state law authorizing the State to appeal in a criminal case was necessary, but not sufficient, to give the State the right to appeal in a federal forum; instead, "some independent federal basis," which the Court found in 28 U.S.C. 1291, "is required if a State is to perfect its appeal." *Manypenny*, 451 U.S. at 244. The Court explained that state law "does not affect the exclusively federal character of the forms of review available once the state sovereign enters federal court," *id.* at 249 n.26, and thus federal review is available only "within constitutional constraints," *id.* at 249. So too here, it was not sufficient for petitioners to establish standing under state law to pursue their claims; rather, federal

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[6] Contrary to petitioners' contention (Pet. 9), it is irrelevant whether the application of Article III standing requirements would serve the purposes of Section 1442, because those requirements are imposed by the Constitution.

adjudication of those claims was available only "within constitutional constraints," including those imposed by Article III.[7]

2. a. The Fifth Circuit correctly held that Tulane was entitled to remove this case under 28 U.S.C. 1442(a)(1) as a "person acting under" a federal officer. In so holding, the court correctly rejected petitioners' argument that the term "person" in Section 1442(a)(1) is limited to natural persons and does not include corporations and similar legal entities such as Tulane. Moreover, the Fifth Circuit's holding accords with that of every other court of appeals to address the issue, as petitioners concede (Pet. 20).

i. The Dictionary Act, 1 U.S.C. 1, establishes a presumption that the term "person," when used in a federal statute, is not limited to natural persons:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> * * * * *
>
> the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

Congress intended the rules of interpretation set forth in the Dictionary Act to "apply across-the-board except where the Act [to be interpreted] by its terms called for a

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[7] Petitioners err in citing Professors Wright and Miller for a contrary proposition. Pet. 11-12. Professors Wright and Miller say that "state rules that recognize standing *need not be honored* if Article III requirements are not met." 13A C. Wright, A. Miller & C. Cooper, *Federal Practice and Procedure* § 3531.14, at 91 (2d ed. 1984) (emphasis added).

deviation from this practice." *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 689 n.53 (1978).

Petitioners concede that the Dictionary Act's rule that a "person" includes entities other than natural persons applies to Section 1442(a)(1) "unless the context requires otherwise." See Pet. 16-17. They contend, however, that a more restrictive interpretation is required by the text, history, and purpose of Section 1442. That contention is incorrect.

The text of Section 1442(a) strongly suggests that the term "person" in Section 1442(a)(1) is *not* limited to natural persons. The opening paragraph of Section 1442(a) authorizes removal by "any of the following persons." Included among the listed "persons" who may remove an action is, under Section 1442(a)(2), "[a] property holder whose title is derived from [an officer of the United States]." 28 U.S.C. 1442(a)(2). Obviously, property can be held by, and titled in, corporations, partnerships, trusts, and other non-natural entities. Therefore, the most natural interpretation is that the term "persons," for purposes of Section 1442(a)*(2)*, includes non-natural persons. The same word "persons" refers to the entities entitled to remove under Section 1442(a)*(1)*, the subsection under which this action was removed; the term must, under well-settled canons of construction, be construed to mean the same thing for purposes of Section 1442(a)(1) as it means for purposes of Section 1442(a)(2), and thus to include entities other than natural persons. See, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990). Accordingly, Section 1442 provides evidence "independently indicat[ing] the broad reading" (*Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 725 (1993)) of the term "person" called for under the Dictionary Act.

Petitioners err in resorting to the legislative history of Section 1442 for evidence to overcome the Dictionary Act's rule that "person" is not limited to natural persons. Because the Dictionary Act directs courts to apply its rules of interpretation "unless the context indicates otherwise" (1 U.S.C. 1), courts must limit their examination to the statutory text in which the term at issue is found. See *Rowland*, 113 S. Ct. at 720 ("If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context.'"). Thus, petitioners' reliance on legislative history is misplaced.

In any event, nothing in the legislative history of Section 1442 suggests that the term "person" is limited to natural persons. Congress adopted the modern version of Section 1442 in the 1948 revision of the Judicial Code. The legislative history of that recodification contains only one brief paragraph concerning Section 1442, which, not surprisingly, does not address the question presented here:

> The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. [The previous statute] was limited to revenue officers engaged in the enforcement of the criminal or revenue laws.

H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947). Petitioners simply misread that paragraph when they assert that "[t]he comment's reference to a 'person acting under' as an 'employee' is more consistent with an individual working directly for the government than a corporation acting pursuant to a contractual arrangement." Pet. 18. In fact, the paragraph does not contain any reference whatsoever to the statutory phrase

"person acting under"; much less does it expressly equate a "person acting under" a federal officer to a federal employee, as petitioners would have it. Furthermore, assuming *arguendo* that the paragraph, though not explicit on the matter, implies a similarity between "person[s] acting under" a federal officer and federal employees, it does not answer the question whether such "person[s]" can only be natural persons. In sum, the paragraph of the committee report upon which petitioners rely, construed most favorably to petitioners, is ambiguous with respect to the question presented here. It therefore cannot overcome the Dictionary Act's rule and the text of Section 1442, both of which both establish that the term "person" in Section 1442 is not limited to natural persons.

Nor can petitioners find support for their position in the absence of case law concerning removal by non-natural persons under prior versions of the federal officer removal statute. See Pet. 17 n.4. The presumption that the term "person" includes non-natural entities is longstanding, as reflected by the fact that when the Dictionary Act was enacted in 1871, it included the presumption. See Act of Feb. 25, 1871, ch. 68, § 2, 16 Stat. 431. It therefore does not represent a "sweeping" change in the law, as petitioners assert (Pet. 19), to apply that presumption in interpreting Section 1442(a)(1).[8]

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[8] Moreover, when Congress enacted the current version of Section 1442 in 1948, it also amended the Dictionary Act to ensure that "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See Act of June 25, 1948, ch. 645, § 6, 62 Stat. 859. If Congress had intended to limit the reach of the phrase "person acting under" in Section 1442(a)(1), it presumably would have made that intention plain in the text of that statute.

Petitioners also err in suggesting that the purpose of Section 1442 supports their restrictive interpretation of "person." See Pet. 19. To the contrary, the purpose of Section 1442 and its predecessors, as described by this Court, supports removal by non-natural persons acting under federal officers:

> [The government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operation of the general government may at any time be arrested at the will of one of its members.

Tennessee v. *Davis*, 100 U.S. at 263 (discussing predecessor of Section 1442); see also *Arizona* v. *Manypenny*, 451 U.S. at 241 n.16 (Section 1442 reflects "the need to safeguard the exercise of legitimate federal authority."); *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969) (Section 1442 reflects "the very basic interest of the enforcement of federal law through federal officials"). The federal government carries out many statutory functions through private entities—from determining Medicare reimbursement, *Peterson* v. *Blue Cross/Blue Shield*, 508 F.2d 55 (5th Cir.), cert. denied, 422 U.S. 1043 (1975), to conducting electronic surveillance, see *Camacho* v. *Autoridad de Telefonos de*

Puerto Rico, 868 F.2d 482, 486-487 (1st Cir. 1989).[9] Those functions are subject to the threat of state interference whether carried out by natural persons or by the other entities listed in the Dictionary Act. See *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 946 (E.D.N.Y. 1992).[10]

ii. The courts of appeals have uniformly held that corporations and similar non-natural entities are "persons" that, when sued in state court for actions carried out under a federal officer, may remove such suits to federal court under Section 1442(a)(1). In *Camacho* v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486-487 (1989), for example, the First Circuit upheld removal under Section 1442(a)(1) by a telephone company that had conducted electronic surveillance at the direction of federal officers. In *Peterson* v. *Blue Cross/Blue Shield*, 508 F.2d 55, cert. denied, 422 U.S.

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[9] Petitioners err in contending that the decision below, by allowing non-natural persons to remove under Section 1442(a)(1), will cause an undue "expansion of federal jurisdiction to embrace a broad class of federal contractors." Pet. 20. As discussed in the next section, the decision below accords with all of the decisions by other courts of appeals addressing the same issue. Under those decisions, moreover, removal is limited to federal contractors who both act under the direction of a federal officer and assert a colorable federal defense. When a contractor meets those conditions, it does not represent an undue expansion of federal jurisdiction to recognize that the contractor has the right to a federal forum whether, for example, the contractor is a sole proprietorship—*i.e.*, a natural person—or a non-natural entity, such as a one-person corporation.

[10] Moreover, the immunity defenses of private, non-natural entities acting under federal officers present the same sort of "manipulable complexities" as those of individuals. *IPPL*, 500 U.S. at 87; see *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1012-1015 (8th Cir. 1984); *Anderson* v. *Occidental Life Ins. Co.*, 727 F.2d 855, 856-857 (9th Cir. 1984); *Bakalis* v. *Crossland Sav. Bank*, 781 F. Supp. 140, 143 (E.D.N.Y. 1991).

1043 (1975), the Fifth Circuit upheld removal under Section 1442(a)(1) by a corporation that acted as a fiscal intermediary on behalf of the Secretary of Health and Human Services in the administration of the Medicare program. 508 F.2d at 58; see also *Texas ex rel. Falkner* v. *National Bank of Commerce*, 290 F.2d 229, 231 (5th Cir.) (upholding removal under Section 1442(a)(1) by two banks in action based on banks' performance of functions enumerated by Secretary of the Treasury), cert. denied, 368 U.S. 832 (1961).

The majority of district courts to address the issue likewise have held that non-natural entities are "persons" that may remove under Section 1442(a)(1). See, *e.g.*, *Pack* v. *AC & S, Inc.*, 838 F. Supp. 1099, 1102-1103 (D. Md. 1993) (manufacturer of turbine generators for the Navy); *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) (corporation); *Bahrs* v. *Hughes Aircraft Co.*, 795 F. Supp. 965, 968 (D. Ariz. 1992) (government contractor); *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 941-947 (E.D.N.Y. 1992) (corporation); *Bakalis* v. *Crossland Sav. Bank*, 781 F. Supp. 140, 143-144 (E.D.N.Y. 1991) (bank); *Neurological Assocs.* v. *Blue Cross/Blue Shield*, 632 F. Supp. 1078, 1080 (S.D. Fla. 1986) (private insurance company); *Group Health, Inc.* v. *Blue Cross Ass'n*, 587 F. Supp. 887, 890 (S.D.N.Y. 1984) (same).

The few district court decisions to the contrary are incorrect and unpersuasive. In *Krangel* v. *Crown*, 791 F. Supp. 1436 (S.D. Cal.), appeal denied, 968 F.2d 914 (9th Cir. 1992), the court recognized that the language of Section 1442(a)(1) indicates that the term "person" includes corporations, but the court held that "the purpose of the statute suggests a different result than its language." 791 F. Supp. at 1446. The court determined that "the purpose of § 1442(a)(1) is to protect

individual officers," and not to protect government contractors. See *id.* at 1442. The *Krangel* court's abandonment of the text of the statute is indefensible, and its understanding of the purpose of the removal statute is flawed (see pp. 17-18, *supra*).

Two other district courts have erroneously relied on decisions holding that federal *agencies* cannot remove under Section 1442(a)(1) to conclude that non-natural entities cannot do so. See *Gensplit Fin. Corp.* v. *Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504, 1508-1510 (E.D. Wis. 1985); *C.H.* v. *American Red Cross*, 684 F. Supp. 1018, 1023-1024 (E.D. Mo. 1987) (adopting the reasoning of *Gensplit*). When this Court held that a federal agency cannot be a "person acting under" a federal officer, *IPPL*, 500 U.S. at 82-84, however, it did not hold that "person" in Section 1442 is limited to natural persons. Rather, the Court reasoned that if Congress had intended to give removal authority to federal agencies, it would not have expressed this intent so obliquely, by referring to agencies merely as entities "acting under" the agency heads. 500 U.S. at 82. The Court also applied the rule of statutory interpretation that the term "person" ordinarily does not include the sovereign. *Id.* at 82-83; see also, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). Neither of those reasons supports the conclusion that the term "person" cannot include the private, non-natural entities listed in the Dictionary Act.[11]

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[11] The Court in *IPPL* also reasoned that Congress could rationally permit federal officers, but not federal agencies, to remove actions against them because the immunity of agencies, in contrast to that of officers, ordinarily is a straightforward issue. 500 U.S. at 85. As noted above (note 10, *supra*), that reasoning does not justify treating natural persons acting under federal officers differently from non-natural entities acting under federal

b. Petitioners also argue (Pet. 20-27) that, even if Tulane is a "person" for purposes of Section 1442(a)(1), it could not remove this action because, with respect to the conduct on which this action is based, it was not "acting under" a federal officer, as required for removal under that provision. A private party "act[s] under" a federal officer, for purposes of Section 1442(a)(1), if the officer directs or otherwise exercises substantial control over the private party's actions. See, *e.g.*, *Camacho*, 868 F.2d at 486; *Peterson*, 508 F.2d at 57. In caring for the monkeys, Tulane acted primarily under the direction of NIH Deputy Director Dr. William Raub and therefore satisfied the "acting under" requirement.

Petitioners do not take issue with the findings below that Tulane could not act with respect to the monkeys without the permission of NIH officials. See Pet. 21. Nor do petitioners challenge the finding below (Pet. App. A3) that Tulane acted "strictly as an aide to NIH in its role as custodian" of the monkeys. Pet. 21. Instead, petitioners argue that a person cannot "act under" a federal officer unless that federal officer has "ultimate control" over the relevant subject matter. Pet. 20-25. Petitioners claim that NIH officials did not have such control, because the monkeys belonged to IBR, and NIH was only their custodian. Pet. 21. That fact-bound claim has been rejected by both courts below and does not warrant further review.

In any event, petitioners' argument lacks merit. Petitioners cite instances in the record in which IBR reiterated its ownership rights over the monkeys and NIH officials acknowledged those rights. See Pet. 21-22.

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officers. Both sorts of "persons" may assert immunity defenses of sufficient complexity that Congress could reasonably have concluded that they should be resolved in a federal forum.

That evidence, however, does not support petitioners' assertion that IBR "alone had the authority to decide the course of action to be taken." Pet. 22. Moreover, there is ample evidence in the record that NIH has substantial authority over the monkeys. The record shows that NIH officials decided (in consultation with IBR) to transfer the monkeys to Tulane. Joseph Brady Dep. 39. It also shows that NIH officials played a major role in directing the research on the monkeys, reviewing and editing the research protocol, and convening a panel of independent experts to make recommendations concerning the health and physical status of the monkeys. Wm. Raub Dep. 225-226. NIH also provided funds that supported the care of and experiments on the monkeys from operating funds of the Office of the Director of NIH. *Id.* at 95.

c. Finally, petitioners argue that Tulane has not shown that it acted under a single federal "officer," rather than several federal officers. Pet. 26-27. That fact-bound argument does not merit further review. As noted above, and as the record upon which the district court relied (Pet. App. A7) amply demonstrates, Tulane acted primarily under one NIH officer, Dr. Raub. Dr. Raub signed the agreement with Tulane for care of the monkeys, approved the research protocol, and convened a panel of experts to make recommendations on the health and welfare of the monkeys. Dr. Raub also made the decision to transfer the monkeys to Tulane. Raub Decl. 2; Raub Dep. 266, 390-391.

Moreover, petitioners offer no legal support for their argument that Tulane had to identify one, and only one, federal officer that it was "acting under." Nor does common sense support such a requirement. The heads of federal agencies, like the heads of corporations, must delegate duties to subordinates. Moreover, many such duties require coordination among numerous federal

officials. It was therefore sufficient for Tulane to show that it acted primarily under Dr. Raub to remove this case under Section 1442(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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